1494.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 160.

CHARLES A. TINKER, PLAINTIFF IN ERROR,

vs.

FREDERICK L. COLWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED NOVEMBER 21, 1902.

(18,738.)

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a Court of Appeals, from the First Department.

FREDERICK L. COLWELL, Respondent,
against
CHARLES A. TINKER, Appellant.

Case on Appeal from Order in a Special Proceeding.

Nelson Smith, attorney for appellant, 141 Broadway, New York.
Thomas McAdam, attorney for respondent, 220 Broadway, New York.

1 *Notice of Motion, Read in Support of Motion.*

Supreme Court of the State of New York.

FREDERICK L. COLWELL, Plaintiff,
against
CHARLES A. TINKER, Defendant.

Please take notice that upon the annexed petition of Charles A. Tinker, the above-named defendant, verified April 17th, 1901, and the discharge in bankruptcy granted by the district court of the United States for the southern district of New York, discharging the said Charles A. Tinker from all his debts, pursuant to the acts of Congress relating to bankruptcy which existed on the 13th day of September, 1899, including the judgment, mentioned in said petition, recovered against him in the above-entitled action on the 9th day of February, 1897, a certified copy of said discharge under the seal of said district court of the United States being annexed to said petition, and a copy thereof herewith served upon you, an application will be *be* made to this court, at a special term, part I, to be held in the county court house, in the county of New York,
2 on the 12th day of June, 1901, at the opening of court, or as soon thereafter as counsel can be heard, for an order directing said judgment to be cancelled and discharged of record, pursuant to the statute in said case made and provided, and for such other and further relief as the said petitioner may be entitled to.

Dated May 24th, 1901.

NELSON SMITH,
Att'y for C. A. Tinker, Petitioner,
141 *Broadway, N. Y. City.*

To Frederick L. Colwell, Esq., plaintiff; Thomas McAdam, Esq., att'y for plaintiff, 220 Broadway, N. Y. city.

3 *Petition, Read in Support of Motion.*

Supreme Court, County of New York.

FREDERICK L. COLWELL, Plaintiff,
against
CHARLES A. TINKER, Defendant.

To the supreme court of the State of New York:

The petition of Charles A. Tinker, respectfully shows to this honorable court:

I. That this was an action by the said Frederick L. Colwell, as plaintiff, against your petitioner as defendant, for criminal conversation with his wife; that judgment was recovered in said action against your petitioner, as defendant therein, on the 9th day of February, 1897, for $50,000 damages, with $653.98 costs, amounting in the aggregate to the sum of $50,653.98; that the judgment roll in said action was duly filed in the office of the clerk of the city and county of New York on said 9th day of February, 1897, and that said judgment on that day was duly docketed in the said county clerk's office.

II. That your petitioner did not own or possess, nor have any interest in, any real property at the time of the recovery of said judgment, nor since the recovery of the same, and that hence
4 the said judgment is not, and has never been, a lien on any real property of your petitioner.

III. That your petitioner is, and at the time of the bankruptcy proceeding hereinafter mentioned was, and for more than a year next immediately preceding the commencement of said bankruptcy proceedings had been a resident of the city, county and State of New York, and had a place of business in said city and county where he resided, namely, No. 124 West 121st street, in the said city and county.

IV. That on the 13th day of September, 1899, your petitioner duly filed his petition in the office of the clerk of the district court of the United States for the southern district of New York, addressed to the Hon. Addison Brown, as judge of said district court, pursuant to the acts of Congress relating to bankruptcy, and praying that he might be adjudged by the said district court to be a bankrupt within the purview of the said acts of Congress. That such proceedings were duly had upon such petition; that your petitioner was, on the 13th day of September, 1899, duly adjudged a bankrupt by the said district court, under and pursuant to the acts of Congress relating to bankruptcy.

That such further proceedings were duly had in the said bankruptcy proceedings; that your petitioner was, on the second day of February, 1900, by the order and judgment of the said district court

of the United States, duly discharged from all debts and claims which were made provable by the said acts of Congress against his estate, and which existed on the 13th day of September, 1899, on which day the said petition for his adjudication was filed, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

5 V. That the said judgment was not recovered against your petitioner for a wilful and malicious injury to the person or property of the said Frederick L. Colwell, within the meaning of the said acts of Congress, and that by virtue of the said order, judgment and discharge so granted by the said district court of the United States, your petitioner has been duly discharged from the said judgment, as he is informed and verily believes; that a certified copy of the said discharge, duly certified by the clerk of the said district court, under the seal of the said court, is hereto annexed and forms a part of this petition, which certified copy your petitioner exhibits to this court.

VI. That the said judgment was the only debt of your petitioner or demand against him mentioned in his said petition in bankruptcy, filed as aforesaid; that the said judgment creditor, Frederick L. Colwell, appeared in said bankruptcy matter in opposition to your petitioner's application for a discharge, and filed in the clerk's office of said district court specifications against the same, a copy of which is hereto annexed, forming a part hereof. That your petitioner filed in the said clerk's office exceptions to the said specifications, a copy of which is hereto annexed and also forms a part hereof. That the said district court duly made an order sustaining your petitioner's exceptions to said specifications and overruling the said specifications, and ordering that your petitioner, as such bankrupt, be discharged from all debts and claims which are made provable by the bankrupt acts against his estate, and which existed on the 13th day of September, 1899, a copy of which order of the said district court is hereto annexed and forms a part hereof.

Wherefore, your petitioner prays that an order may be made by this honorable court directing that the said judgment be cancelled and discharged of record, in the office of the clerk of the city

6 and county of New York, and that your petitioner may have such other and further relief in the premises as may be just and proper, and your petitioner will forever pray, etc.

CHARLES A. TINKER, *Petitioner.*

NELSON SMITH,
Att'y for Petitioner.

COUNTY OF NEW YORK, *ss:*

Charles A. Tinker, being duly sworn, deposes and says: That he is the petitioner in the above petition, which is signed by him. That he has heard the said petition read and knows the contents thereof; that the same is true to the knowledge of deponent, except

as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

CHARLES A. TINKER.

Sworn to before me this 17th day of April, 1901.

FREDERICK WILLETS,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

7 *Certified Copy of Discharge in Bankruptcy of Charles A. Tinker, Read in Support of Motion.*

No. 1466.

District Court of the United States, Southern District of New York.

Whereas, Charles A. Tinker, in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Charles A. Tinker be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 13th day of September, A. D. 1899, on which day the petition for adjudication was filed by him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable Addison Brown, judge of said district court, and the seal thereof, this 2d day of February, A. D. 1900.

ADDISON BROWN,
District Judge.

SAMUEL H. LYMAN, *Clerk.*

I, Samuel H. Lyman, clerk of the district court of the United States for the southern district of New York, do hereby certify that the above is a true copy of an order of discharge made in the above entitled matter.

In testimony whereof, I have caused the seal of the said court to be hereto affixed, at the city of New York, in the southern district of New York, this 28th day of January, in the year of our Lord one thousand nine hundred and one and of the Independence of the said United States the one hundred and twenty-fifth.

[SEAL.]

SAMUEL H. LYMAN, *Clerk.*

8 *Specification of Objections of Frederick L. Colwell to the Discharge of Charles A. Tinker in Bankruptcy, Read in Support of Motion.*

In the District Court of the United States for the Southern District of New York.

In the Matter of CHARLES A. TINKER, Bankrupt.

Frederick L. Colwell, of the borough of Manhattan, city of New York, in the county of New York and State of New York, a party interested in the estate of said Charles A. Tinker, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specifications:

I. That said alleged bankrupt's schedules show that he has no outstanding dischargeable debts and, therefore, this court has no jurisdiction to discharge that which does not exist.

II. Said schedules show that the only creditor of said alleged bankrupt is the undersigned, Frederick L. Colwell, who is the judgment creditor, owning a certain judgment obtained by him against said alleged bankrupt for fifty thousand ($50,000) dollars damages and costs on a cause of action charging the said bankrupt with criminal conversation with said creditor's wife. That said
9 cause of action involved the wilful and malicious injury to the person or property of another, and comes under the exceptions enumerated in subdivision 2 of sec. 17 of the bankruptcy act, and is not a dischargeable debt.

III. The petition and schedules annexed show that the real object of these proceedings is to have discharged, if possible, the said judgment of the undersigned, or if this be not so, it must be to rid himself of some other unknown creditors whose names have been concealed, and who have had no notice of these proceedings, and the attempt to procure a discharge is in the nature of a fraud upon the bankruptcy act.

IV. The question of jurisdiction being always open, it is here distinctly raised that it may be passed upon with respect to said judgment, and the cause of action represented by it.

FREDERICK L. COLWELL.

(A copy.)

COUNTY OF NEW YORK, *ss:*

Frederick L. Colwell, being duly sworn, deposes and says: He is a creditor of Dr. Charles A. Tinker, an alleged bankrupt; that he has read the foregoing specifications and knows the contents of the same; that the same are true of his own knowledge, except as to the

matters therein stated to be on information and belief, and as to those matters he believes them to be true.

FREDERICK L. COLWELL.

Sworn to before me this 5th day of January, 1900.
A. JACOBY,
Notary Public, N. Y. Co.

10 *Exceptions of Chas. A. Tinker, Bankrupt, to the Specifications of Objections of Mr. Colwell to His Discharge in Bankruptcy, Read in Support of Motion.*

District Court of the United States, Southern District of New York.

In the Matter of CHARLES A. TINKER, Bankrupt.

Exceptions of the bankrupt to the specifications filed by Frederick L. Colwell, a creditor.

The said Charles A. Tinker, bankrupt, hereby excepts to the specifications filed by Frederick L. Colwell, a creditor, on the following grounds:

I. That the said specifications do not state any facts to bar or prevent him from obtaining his discharge from his debts in this proceeding and that they are insufficient to prevent him from obtaining his discharge herein from his debts.

II. That said specifications are insufficient to oust the court of its jurisdiction in this matter to give the said bankrupt a discharge from his debts herein pursuant to the statute.

Wherefore, the said bankrupt prays that these exceptions to the said specifications may be sustained, and that the said Frederick L. Colwell may take nothing by the said specifications.

NELSON SMITH,
Attorney for said Bankrupt, 146 Broadway New York City.

11 *Order Sustaining Exceptions and Overruling Objections to Bankrupt's Discharge in Bankruptcy Read in Support of the Motion.*

In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of CHARLES A. TINKER, Bankrupt.

At the city of New York, in said district, on the 27th day of January, 1900, before the Hon. Addison Brown, judge.

This cause having come on to be heard upon the petition of the bankrupt to be discharged from his debts, pursuant to the bankrupt acts, the referee's report, the specifications of Frederick L. Colwell, a judgment creditor, filed in opposition to such discharge, and the ex-

ceptions of the bankrupt to such specifications, and after hearing Nelson Smith, of counsel for the bankrupt, and Thomas McAdam, of counsel for such judgment creditor,

It is ordered by the court that the said exceptions be sustained and said specifications in opposition be and are hereby overruled, and that the said Charles A. Tinker, bankrupt, be discharged from all debts and claims which are made provable by the bankrupt acts against his estate, and which existed on the 13th day of September,
A. D. 1899, on which day the petition for adjudication was
12 filed by him, excepting such debts as are excepted from the operation of a discharge in bankruptcy.

ADDISON BROWN.

Endorsed: Filed February 2d, 1900.

"Service of the within petition, copy order of discharge in bankruptcy and notice of motion admitted.

Dated June 1st, 1901.

THOMAS McADAM,
Attorney for Plaintiff Colwell."

Affidavit of Service.

Supreme Court.

FREDERICK L. COLWELL, Plaintiff,
against
CHARLES A. TINKER, Defendant.

STATE OF NEW YORK,
County of New York, } ss:

Frank A. Cox, being duly sworn, deposes and says: That he served the annexed petition and notice of motion in this action on Frederick L. Colwell, the plaintiff herein, by delivering to and leaving with him personally a copy of said petition and notice of motion.

13 That such service was made on said Frederick L. Colwell on the 6th day of June, 1901, at No. 45 Broadway, borough of Manhattan, city of New York.

That deponent knew the person so served to be the same person mentioned and described in said petition and notice of motion as the plaintiff in this action.

That the deponent is of the age of 21 years and upwards and resides at No. 463 Jefferson avenue, borough of Brooklyn, in the city of New York.

FRANK A. COX.

Sworn to before me this 8th day of June, 1901.

JOHN C. TRAVIS,
Commissioner of Deeds, City of New York, No. 50.

14 *Order of the Special Term Denying Motion.*

At a special term of the supreme court of the State of New York, held at the county court house, in the county of New York, on the 1st day of July, 1901.

Present: Hon. Henry A. Gildersleeve, justice.

FREDERICK L. COLWELL, Plaintiff,
against
CHARLES A. TINKER, Defendant.

On reading and filing notice of motion and the petition of said Charles A. Tinker, verified April 17th, 1901, praying for the discharge of record of the judgment mentioned in said petition recovered in this court by said Frederick L. Colwell against him on the 9th day of February, 1897, for the sum of $50,653.98, and the papers annexed to said petition, namely, a certified copy of the discharge in bankruptcy, granted to said petitioner on the 2d day of February, 1901, by the district court of the United States for the southern district of New York, the specifications of objections by the said judgment creditor to the said discharge, verified January 5th, 1900; the exceptions by the said Charles A. Tinker to said specifications of said objections and the order of the said district court, filed February 2d, 1900, sustaining said exceptions and overruling
15 said objections; and after hearing Nelson Smith, Esq., of counsel for the said petitioner, in support of said motion, and Thomas McAdam, Esq., of counsel for the judgment creditor, in opposition thereto,

It is, on motion of the counsel of said judgment creditor, ordered that the said motion be, and the same hereby is, denied, with ten dollars costs, without prejudice to any right the petitioner may have to prosecute an action to procure a determination of the effect of said discharge in bankruptcy upon said judgment, or otherwise test the validity of said discharge as a release of said petitioner from said judgment.

This order is directed to be entered *nunc pro tunc* as of July 1st, 1901, and is in resettlement of the order entered herein on that day. Ent.

H. A. G., *J.*

Endorsed: "Filed Aug. 8th, 1901, *nunc pro tunc* as of July 1st, 1901."

16 *Notice of Appeal to Appellate Division.*

Supreme Court, County of New York.

FREDERICK L. COLWELL, Plaintiff,
against
CHARLES A. TINKER, Defendant.

Please take notice that the defendant, as petitioner, hereby appeals to the appellate division of the supreme court, in the first department, from the order made in the above-entitled action by the special term of the court (part I), bearing date July 1st, 1901, and entered in the office of the clerk on August 8th, 1901, *nunc pro tunc* as of July 1st, 1901, denying the application of said defendant, as petitioner, to cancel and discharge of record the judgment recovered against him in the above-entitled action on the 9th day of February, 1897, for $50,653.98 damages and costs, and mentioned in the defendant's petition herein, and from the whole and every part of said order.

Dated New York, August 8th, 1901.

NELSON SMITH,
Attorney for said Defendant, as Petitioner and Appellant, 141 Broadway, N. Y. City.

To Thomas McAdam, Esq., attorney for plaintiff and judgment creditor, respondent. Frederick L. Colwell, plaintiff. William Sohmer, clerk.

17 Service of the within notice of appeal and notice of filing is hereby admitted.

Dated August 8th, 1901.

THOMAS McADAM,
Attorney for Respondent.

Opinion of the Special Term.

COLWELL
vs.
TINKER.

GILDERSLEEVE, *J.*:

On February 9, 1897, the plaintiff recovered a judgment against the defendant for $50,000 for criminal conversation with plaintiff's wife. The defendant here moves to have said judgment canceled and discharged of record. The defendant swears that he had no real estate at the time of the entry of the judgment, and has not had any interest in real estate since such recovery, and that the judgment,

therefore, is no lien upon any real estate. On the 13th of September, 1899, defendant filed a petition for adjudication in bankruptcy. The plaintiff objected to the discharge of defendant in bankruptcy on the ground that the only creditor of the bankrupt, as shown by the schedules, was the plaintiff, the owner of the aforesaid judgment, and that said judgment was recovered in an action involving the wilful and malicious injury to the person or property of another, and, therefore, came under the exceptions enumerated in subdivisions 2 of section 17 of the bankruptcy act, and was, in consequence, not a debt from which defendant could be discharged. The objections of plaintiff were duly considered and overruled by Judge Brown, on or about January 27, 1900, and on February 2, 1900, an order of the district court of the United States for this district was duly entered, discharging the defendant from all debts which
18 existed on September 13, 1899, the date of the filing of the petition for adjudication in bankruptcy, "excepting such debts as are by law excepted from the operation of a discharge in bankruptcy." Section 1268 of the Code of Civ. Pro. provides that at any time after one year has elapsed since a bankrupt was discharged from his debts under the bankruptcy act, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him for an order directing the judgment to be cancelled and discharged of record, and, if it appears that he has been discharged from the payment of that judgment, or the debt upon which it was recovered, such order must be granted. Section 17, subdivision 2, of the bankruptcy act provides that the discharge shall not release the bankrupt from judgments in actions for wilful and malicious injuries to the person or property of another. The plaintiff claims that the decision of Judge Brown overruling plaintiff's objections to the discharge of defendant does not render the question of defendant's discharge from the said judgment *res adjudicata*, for the reason that, in his opinion, the Federal judge stated that the discharge would be operative against other debts, whether enumerated or not, and that jurisdiction did exist, and that he declined to pass on the question whether the plaintiff's judgment herein was dischargeable or not. The opinion is not handed up on this motion, but this statement of the plaintiff's counsel appears to be conceded by his adversary, so I will accept it as true. The question, therefore, which I am here called upon to decide is whether an action for criminal conversation is one for "wilful and malicious injuries to the person or property of another." It is, of course, not pretended that Tinker, in forming his culpable relations with Mrs. Colwell, was actuated merely by a "wilful and malicious" desire to injure Colwell, nor, indeed, is there any positive reason for believing that such a motive played any part in the matter. It may well be said, however, that
19 it was a "wilful injury," as it was not done inadvertently. It was an injury to the person of Colwell, in the sense that his peace of mind and happiness were greatly damaged by the loss of his wife's affections (Code, sec. 3343, subd. 9). It was also an

injury to the property of Colwell. A husband has a right to the services of his wife, while they live together and she is not engaged in a separate business, and he also has a right to her society and comfort. Tinker, by his seduction of Mrs. Colwell, has deprived Colwell of the services, comfort and society of his wife. We have, therefore, unquestionably, a wilful injury to the person and property of another. But was that injury malicious? As I have above intimated, there is no proof of actual malice. But was there constructive malice? Malice has been defined as a disregard of social duty and of the rights of others (98 Tenn., 48). The term malice, as applied to torts, such as criminal conversation, does not necessarily mean that which must proceed from a spiteful, malignant or revengeful disposition, but conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. As defined by Judge Brown, in the case of United States *v.* Reed, 86 Fed. Rep., 309, "Malice consists in one's wilful doing of an act, or wilful neglect of a known obligation, which he knows is liable to injure another, regardless of the consequences; and a malignant spirit or a specific intention to hurt a particular individual is not an essential element." It seems to me that the judgment which the defendant here seeks to have vacated was recovered in an action founded upon wilful and malicious injuries to the person and property of another. It was, therefore, under the provisions of section 17, subdivision 2 of the bankruptcy act, not affected by defendant's discharge in bankruptcy. Motion denied with $10 costs.

20 *Waiver of Certification.*

It is hereby stipulated that the foregoing consists of true copies of the original papers which were used on the motion in the court below, and of the whole thereof, specified in the order appealed from, and of said order and the notice of appeal and the opinion of the court below, and certification by the clerk is hereby waived.

Dated August 21, 1901.

NELSON SMITH,
Attorney for Appellant.
THOMAS McADAM,
Attorney for Respondent.

21 *Order of Affirmance of the Appellate Division.*

At a term of the appellate division of the supreme court of the State of New York, held in and for the first department, at the court house of the said appellate division, in the county of New York, on the 8th day of November, 1901.

Present: Hon. Charles H. Van Brunt, P. J. Hon. Edward Patterson, Hon. Morgan J. O'Brien, Hon. George L. Ingraham, Hon. Frank C. Laughlin, JJ.

FREDERICK L. COLWELL, Respondent,
against
CHARLES A. TINKER, Appellant.

The above-named Charles A. Tinker, having appealed to the appellate division of the supreme court, first department, from the order made at the special term of the court in the above-entitled case, bearing date July 1st, 1901, and entered in the office of the clerk of the county of New York on August 8th, 1901, *nunc pro tunc* as of July 1st, 1901, denying the application of said Charles A. Tinker as petitioner to cancel and discharge the judgment of record recovered against him in the above-entitled action by the above named
22 Frederick L. Colwell on the 9th day of February, 1897, mentioned in the petition herein, for $50,653.98 damages and costs, and said appeal having been heard by this court, and after hearing Nelson Smith, Esq., of counsel for the said appellant in support of said appeal, and Thomas McAdam, Esq., of counsel for the respondent in opposition thereto, and due deliberation having been had,

Now, on motion of Thomas McAdam, attorney for respondent,

It is ordered that the order appealed from be, and the same is, affirmed, with $10 costs and disbursements, with leave to the appellant to renew said application to cancel said judgment upon such additional papers as he may be advised.

Enter.

C. H. V. B.

Endorsed: Filed Dec. 9th, 1901.

Certification of Order.

Appellate Division of the Supreme Court, State of New York, First Judicial Department.

Clerk's Office, New York County.

FREDERICK L. COLWELL
against
CHARLES A. TINKER.

I, Alfred Wagstaff, clerk of the appellate division of the supreme court, in the first judicial department, do hereby certify that
23 the foregoing is a copy of the order made by said court upon the appeal in the above-entitled action or proceeding, and entered in my office on the ninth day of December, 1901, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of New York, this ninth day of December, 1901.

[SEAL.] ALFRED WAGSTAFF, *Clerk.*

Endorsed by the clerk of the county of New York.
Filed December 9th, 1901.

Notice of Appeal to the Court of Appeals.

Supreme Court, County of New York.

FREDERICK L. COLWELL, Respondent,
against
CHARLES A. TINKER, Appellant.

Please take notice that the above-named Charles A. Tinker, appellant, hereby appeals to the court of appeals of the State of New York from the order of the appellate division of the supreme
24 court of said State, first department, bearing date November 8th, 1901, and entered in the office of the clerk of said appellate division on the 9th day of December, 1901, and in the county clerk's office of the county of New York on the same day, affirming the order of the special term of the supreme court made in the above case, bearing date July 1st, 1901, and entered in the office of the clerk of the county of New York on August 8th, 1901, *nunc pro tunc* as of July 1st, 1901, which order denied the application of the said appellant to cancel the judgment recovered against him by the said Frederick L. Colwell on the 9th day of February, 1897, for the sum of $50,653.98, mentioned in the petition of said Charles A. Tinker, and from the whole and every part of the said order of said appellate division.

Dated New York, December 10th, 1901.

NELSON SMITH,
Attorney for Appellant, 141 *Broadway, New York City.*

To Thomas McAdam, Esq., attorney for respondent, 220 Broadway, New York city. William Sohmer, clerk of county of New York.

Endorsed: Filed Dec. 9th, 1901.

Service of within notice of appeal and notice of filing is hereby admitted.
December 10th, 1901.

THOMAS McADAM,
Attorney for Respondent.

M. J. D.

25 *Stipulation as to Correctness of Case.*

Court of Appeals.

FREDERICK L. COLWELL, Respondent,
against
CHARLES A. TINKER, Appellant.

It is hereby stipulated that the foregoing consists of copies of the notice of appeal to this court, the order of the appellate division of the supreme court, first department, appealed from to this court, and the papers on which the court below acted in making such order.

Dated December 13, 1901.

NELSON SMITH,
Att'y for Appellant.
THOS. McADAM,
Att'y for Respondent.

26 *Opinion of the Appellate Division.*

Supreme Court, Appellate Division, First Department, October, 1901.

Charles H. Van Brunt, P. J.; Edward Patterson, Morgan J. O'Brien, George L. Ingraham, Frank C. Laughlin, JJ.

FREDERICK L. COLWELL, Respondent,
vs.
CHARLES A. TINKER, Appellant. } No. 3411.

Appeal from order denying application to cancel of record judgment recovered against defendant.

Nelson Smith, for appellant.
Thomas McAdam, for respondent.

Per Curiam:

By the order from which this appeal is taken, an application made by the defendant to vacate a judgment, under the provisions of section 1268 of the Code of Civil Procedure, was denied. That application was made upon a petition presented by the defendant, in which he set forth that on the 13th day of September, 1899, he was duly adjudged a bankrupt by the district court of the United States for the southern district of New York, and that such proceedings were subsequently had thereupon; that on the 2d day of February,
27 1900, by an order and judgment of that court, he was discharged from all debts and claims which were made provable against his estate and which existed on the 13th day of September, 1899. He further represented in his petition that the only debt or demand against him mentioned in his petition in bankruptcy was

one arising upon a judgment recovered by the plaintiff in this action; and he also set forth "that the said judgment was not recovered against your petitioner for a wilful and malicious injury to the person or property of the said Frederick L. Colwell, within the meaning" of the bankruptcy law; but he also stated that the action in which such judgment was recovered was one brought against him for criminal conversation with the wife of the judgment creditor, and that the judgment was for the sum of fifty thousand dollars and costs and was entered on the 9th day of February, 1897, in the office of the clerk of the city and county of New York.

It appears in the record that Colwell, the plaintiff herein, appeared in the defendant's bankruptcy proceeding and objected to a discharge being granted, and in his objections filed, stated that he was the judgment creditor of the bankrupt, the owner of the judgment for fifty thousand dollars and costs, and that such judgment was recovered on a cause of action charging the said bankrupt with criminal conversation with said creditor's wife, and that such cause of action involved a wilful and malicious injury to the person or property of another and, therefore, was not discharged by the bankruptcy law.

It is provided by section 17 of the bankruptcy act (30 U. S. Stat. at Large, at p. 550), in effect, that a discharge in bankruptcy does not release the bankrupt from judgments in actions for wilful and malicious injury to the person or property of another. By the Code of Civil Procedure of the State of New York (§ 3343, subdiv. 9) a personal injury is defined as including libel, slander, *criminal*
28 *conversation*, seduction and malicious prosecution; also assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff or of another.

The test of the defendant's right to have the judgment vacated under the provisions of section 1268 of the Code of Civil Procedure, depends upon its having been recovered for a personal injury wilfully and maliciously inflicted. We have nothing before us to show upon what the judgment against this appellant was based, except a mere general allegation that it was in an action for criminal conversation. The moving party insists it was not for a wilful and malicious injury, but the opposing party as strenuously contends that it was based upon such an injury. We cannot determine the real nature of the action upon the simple characterization that each party has given it. In order that its real nature may be known, the judgment record should be presented to the court. An action for criminal conversation does not necessarily involve malice against the plaintiff, but that element may be involved, and before a determination can be had upon the subject the judgment record should be before the court.

For this reason the order appealed from should be affirmed, with $10 costs and disbursements, but with leave to the appellant to renew his motion to vacate the judgment upon proper and sufficient papers.

Ingraham, J., concurs in result.

29 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 31st day of January, in the year of our Lord one thousand nine hundred and two, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, February 1st, 1902.

30 FREDERICK L. COLWELL, Respondent,
vs.
CHARLES A. TINKER, Appellant.

Be it remembered, that on the 14th day of December in the year of our Lord one thousand nine hundred and one, Charles A. Tinker the appellant in this action, came here into the court of appeals, by Nelson Smith, his attorney, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court in and for the first judicial department. And Frederick L. Colwell, the respondent in said action afterwards appeared in said court of appeals by Thomas McAdam his attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said court of appeals having heard this cause argued by Mr. Nelson Smith of counsel for the appellant, and by Mr. Thomas McAdam of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is affirmed, with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

31 Therefore, it is considered that the said order be affirmed, with costs as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *February 1st*, 1902.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein, attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

Filed Feb. 14, 1902.

31½ [Endorsed:] In the court of appeals from the appellate division of the supreme court, first dept. Frederick L. Colwell, respondent ag'st Charles A. Tinker, appellant Return Appeal from order in a special proceeding. Remittitur. Nelson Smith, att'y for appellant, 141 Broadway, N. Y. Thomas McAdam, att'y for respondent 220 Broadway. N. Y.

32 At a special term of the supreme court of the State of New York, held in and for the county of New York, part II thereof, in the county court house in said county on the 14th day of February, 1902.

Present: Hon. Miles Beach, justice.

FREDERICK L. COLWELL, Plaintiff,
against
CHARLES A. TINKER, Defendant.

This cause having been brought on upon the remittitur sent down from the court of appeals and now filed in this court, by which remittitur it appears that an appeal was taken by the above named defendant from the order of this court to said court of appeals and that the said order of this court has been affirmed by said court with costs, and that the record and proceedings had been directed by said court of appeals to be remitted to this court and this court directed to enforce the judgment of the court of appeals according to law, now therefore on motion of Thomas McAdam, of counsel for the above named plaintiff, it is

Ordered and adjudged that the judgment of the said court of appeals be and the same is hereby made the judgment of this court and that the plaintiff have execution against the defendant for the costs of said appeal as well as for the costs in this court amounting to the sum of $110.90 as taxed, and that this judgment be annexed to the judgment roll.

MILES BEACH, *J. S. C.*

Endorsed: Judgment roll. Filed Feb'y 14th, 1902.

33 STATE OF NEW YORK, }
County of New York. }

Clerk's office of the supreme court of the State of New York for the county of New York.

I, Thomas L. Hamilton, clerk of the county of New York and of the supreme court of the State of New York for the said county of New York by virtue of the annexed writ of error, which was served upon me on the 19th day of November, 1902, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 32 inclusive, contain a true and complete transcript of the record and proceedings had in the said court in the suit between Frederick L. Colwell and Charles A. Tinker mentioned in said writ of error as the same remain of record and on file in my office, and that annexed hereto is the petition for said writ of error, the citation to the defendant in error with proof of service of the same, the said writ of error served upon me, the appearance of the defendant in error and waiver of security for costs, and the plaintiff's assignment of errors with a copy of the opinion of the court of appeals.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at my office in the city and county of New York on the 19th day of November 1902.

[Seal New York.]

THOS. L. HAMILTON, *Clerk.*

34 [Endorsed:] In the Supreme Court of the United States. October term 1902. Charles A. Tinker, pl'ff in error against Frederick L. Colwell, def't in error Return of the clerk of the supreme court of the State of New York to the writ of error in this case. Nelson Smith, att'y for pl'ff in error, 141 Broadway, city of New York.

35 *Opinion of the Court of Appeals.*

FREDERICK L. COLWELL, Respondent,
v.
CHARLES A. TINKER, Appellant.

(Decided January 31, 1902.)

Appeal from a final order in a special proceeding made by the appellate division of the supreme court in the first judicial department, affirming an order of the special term, which denied the prayer of the appellant to cancel of record, in the New York county clerk's office, a judgment recovered against him by the respondent.

Nelson Smith for appellant.
Thomas McAdam for respondent.

BARTLETT, *J.:*

The respondent recovered in the supreme court a judgment against the appellant on the ninth day of February, 1897, which was entered in the clerk's office of the county of New York, for $50,653.98, damages and costs, in an action for criminal conversation with his wife. On the thirteenth day of September, 1899, the appellant was adjudicated a bankrupt on his own petition by the district court of the United States for the southern district of New York. On the second day of February, 1890, the appellant was duly discharged.

Section 17 of the bankruptcy act reads in part as follows: "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as (1) * * *; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; * * *"

Section 1268 of the Code of Civil Procedure provides in substance that at any time after one year has elapsed since a bankrupt was discharged from his debts, pursuant to the acts of Congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which the judgment was rendered against him for an order directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment, or the debt upon which it was recovered, an order must be made directing that it be canceled and discharged of record.

When the bankrupt applied for his discharge to the United States district court the respondent challenged the jurisdiction of the court, on the ground that the only debt appearing in the schedules of the bankrupt was the judgment referred to in the action for

criminal conversation, and as that could not be discharged by proceedings in bankruptcy, the court was precluded from granting the discharge, as there was nothing for it to operate upon. The learned district judge, in sustaining the exception to this objection, held that the ordinary course of procedure in adjudging discharges is to grant the application if the bankrupt is otherwise entitled to
36 the discharge without determining in any way the effect of its releasing any particular debt, whether contained in the schedules or not, and thereupon the discharge was granted.

After the expiration of one year from the time of the discharge of the bankrupt, he applied for the cancellation of the judgment under section 1268 of the code. The special term denied the motion on the ground that the judgment was recovered for willful and malicious injuries to the person and property of another. The appellate division affirmed this order, but with leave to appellant to renew the application upon such additional papers as may be advised. This leave to renew was based upon the view entertained by the learned court that nothing was before them to show upon what the verdict against the appellant was based except a general allegation that it was an action for criminal conversation, and that the real nature of the action could not be determined unless the judgment record was before the court, as an action for criminal conversation does not necessarily involve malice against the plaintiff.

It is, therefore, important to determine what is implied by a judgment entered upon the verdict of a jury finding the defendant guilty of criminal conversation with the plaintiff's wife. Section 3343 of the code, subdivision 9, defines a "personal injury" to be, among other things, criminal conversation. As this is a mere legislative definition of a personal injury, for the guidance of the courts in this State, it may be regarded for the purposes of this discussion as of no binding force in the determination of the Federal question now presented. It is very clear upon principle and authority that criminal conversation is a willful and malicious injury to both the person and the property of the husband.

In the recent case of *In re Freche* (5 American Bankruptcy Reports, 479) the United States district court of New Jersey held that a judgment in a father's action for the seduction of his daughter, under the law of New Jersey, is one for the willful and malicious injury to the person and property of another, within the meaning of section seventeen of the bankruptcy act, and is not released by a discharge. The learned district judge in his opinion uses this language: "The judgment recovered in this case in the State court is based upon the theory of compensating the plaintiff for the injuries which he had sustained to his person or property, or both. From the nature of the case, the act of the defendant Freche, which caused the injury, was willful because it was voluntary. The act was unlawful, wrongful and tortious, and being willfully done, it was in law malicious. It was malicious because the injurious consequences which followed the wrongful act were those which might naturally be expected to result from it, and which the defendant Freche must

be presumed to have had in mind when he committed the offense. 'Malice' in law simply means a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts. While it might be true that in the
37 unlawful act Freche was not actuated by hatred or revenge, or passion toward the plaintiff, nevertheless if he acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty and purposely prejudicial and injurious to another, the law will imply malice." (See, also, *United States v. Reed*, 86 Fed. Rep. 308, 312.)

The husband's right to the services of his wife is a right of property. In *Cregin v. Railroad* (75 N. Y., 192) Judge Rapallo, speaking of this right, said: "He had the right to the services of his wife, they were of pecuniary value to him, and any wrong by which he was deprived of those services, or put to expense to remedy or palliate the consequences of the injury to his wife, was a wrong done to his rights and interests." (See also the same case reported in 83 N. Y., 595.) On principle criminal conversation with the wife is a personal injury to the husband without regard to the statutory declarations to that effect in this State.

While loss of service is usually pleaded in this form of action, yet its real foundation is the personal injury inflicted upon the husband. The offense charged is a most grievous wrong against social order and society; it strikes at the foundations of the home and the legitimacy of offspring. The husband, who is entitled to live with his wife and enjoy her society in the marriage relation, finds himself humiliated and, to a certain extent, disgraced by a public scandal; the marriage bed is dishonored; his domestic peace and comfort are destroyed and he is subjected to great mental suffering.

In *Bromage v. Prosser* (4 Barn. & Cress., 247), Bayley, J., writing in an action for words spoken of the plaintiffs in their trade and business as bankers, said: "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."

If there is such a thing as malice in law, and if it is ever presumed by reason of the act committed, it would seem to be in an action for criminal conversation, where a jury has awarded the injured husband damages in the sum of fifty thousand dollars. The defendant alleges this recovery in his petition upon which this proceeding is founded.

In many causes of action it is apparent that to determine whether an act is willful or malicious the surrounding circumstances must be considered, but in an action for criminal conversation, the fact of criminal intercourse being established, malice in law must follow, and the circumstances are important only on the question of damages.

A person voluntarily invading and destroying the marriage relation is guilty of a willful, wanton act, and it is not necessary to prove that he was moved by hatred, revenge or passion towards the husband. The law in such a case implies malice, and the judgment

that follows is for both a willful and malicious injury to the person and property of another.

The policy of the bankrupt law is to discharge the honest and unfortunate debtor from his contract obligations, and not free him from judgments involving his fraud, which implies moral
38 turpitude or intentional wrong, or judgments for willful and malicious injuries to the person or property of another.

In the case of *Re Cotton* (2 N. Y. Legal Observer, 370) the court, in commenting on this latter class of cases, said: "In all of these cases it is held that the payments provided for by the judgments and decrees are of penalties or fines imposed for wrongful or criminal acts, or to enforce a moral or natural duty, rather than of the nature of debts." (See, also, *In re Blumberg*, 1 Amer. Bankruptcy Repts. 634.)

The real nature of this action is sufficiently apparent from the petition of the defendant.

The order of the special term, in denying the defendant's motion that the judgment in this action be canceled and discharged of record, protects the defendant, as it is without prejudice to any right he may have to prosecute an action to procure a determination of the effect of the discharge in bankruptcy upon the said judgment, or otherwise test the validity of the discharge as a release of said defendant from said judgment.

The order of the appellate division should be affirmed, with costs to the plaintiff.

Parker, Ch. J., Gray, O'Brien, Haight, Cullen and Werner, JJ., concur.

Order affirmed.

We hereby stipulate and agree that the foregoing is a copy of the opinion of the court of appeals.

N. Y. October 23d 1902.

THOS. McADAM,
Attorney for the Defendant in Error.
NELSON SMITH,
Att'y for Pl'ff in Error.

39 [Endorsed:] Return to Nelson Smith 151 W. 48th.

40 To the Hon. Rufus W. Peckham, justice of the Supreme Court of the United States:

And now comes Charles A. Tinker, petitioner, by Nelson Smith, Esq., his attorney, and complains that in the record and proceedings, and also in the rendition of an order in the suit pending in the supreme court of the State of New York, in which Frederick L. Colwell was plaintiff, and Charles A. Tinker, your petitioner, was defendant, on the remittitur from the court of appeals of the State of New York, being the highest court of law and equity of said State in which a decision could be had, remitting to said supreme court

the record in the said suit with an order affirming an order theretofore rendered in the appellate division of the supreme court of the State of New York dated the 8th and filed the 9th day of November, 1901, affirming an order made by the special term of the said supreme court of the State of New York held in the county of New York, dated July 1st, 1901, and entered in the clerk's office of said court in the county of New York on the 8th day of August, 1901, *nunc pro tunc* as of July 1st, 1901, which said remittitur from the court of appeals directed that an order be entered in said supreme court sitting in the county of New York, in favor of the said Frederick L. Colwell against the said Charles A. Tinker, your petitioner, upon which direction an order of affirmance with costs was entered in the clerk's office of the said supreme court, and filed in the said clerk's office in the county of New York on the 18th day of February, 1902, wherein was drawn in question the construction
41 of the act of Congress known as the national bankruptcy law of 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved July 1st, 1898;" and the discharge in bankruptcy granted to the petitioner, said Charles A. Tinker, by the district court of the United States for the southern district of New York, on the 2nd day of February, 1900, whereby he was discharged from all debts and claims which were made provable by said act of Congress against his estate, and which existed on the 13th day of September, 1899, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy, and which decision was against the validity of the said discharge under the said act of Congress as construed by said court of appeals, all of which appears in the record and proceedings in the said suit; manifest errors have happened to the great damage of the said Charles A. Tinker, your petitioner.

Wherefore the said Charles A. Tinker, your petitioner, by his attorney aforesaid, prays for the allowance of a writ of error, and such other proceedings as may cause the said errors to be corrected by the Supreme Court of the United States.

NELSON SMITH,
Attorney for Petitioner, 141 *Broadway*,
City & County of New York.

Allowed Oct. 23 1902.

R. W. PECKHAM,
Justice of the Supreme Court of the United States.

42 [Endorsed:] In the Supreme Court of the United States —— term—Charles A. Tinker, plaintiff in error, against Frederick L. Colwell, defendant in error Petition for writ of error. Nelson Smith, att'y for petitioner, 141 Broadway, New York city.

43 In the Supreme Court of the United States, October Term, 1902.

CHARLES A. TINKER, Plaintiff in Error,
against
FREDERICK L. COLWELL, Defendant in Error.

Assignment of Errors.

And now comes Charles A. Tinker, the plaintiff in error in the above cause, by his attorney and counsel and says; that in the record and proceedings and in the decree or order of the supreme court of the State of New York in this cause as affirmed by the judgment of the court of appeals of the said State, there is manifest error in this, to wit:

I. That the said court erred in deciding and adjudging that the discharge in bankruptcy in question granted by the district court of the United States for the southern district of New York to the plaintiff in error on the 2nd day of February, 1900, did not release and discharge the said plaintiff in error from the judgment in question recovered against him by the defendant in error in the supreme court of the State of New York on the 9th day of February, 1897, for the sum of $50,000 damages and $653.98 costs, and in denying the application of the plaintiff in error for the cancellation and discharge of record of said judgment in the office of the clerk of the said supreme court of the State of New York for the county

44 of New York, pursuant to the provisions of the statute of said State, to wit, sec. 1268 of the Code of Civil Procedure of said State, which section of said Code of Civil Procedure provides that at any time after one year has elapsed since a bankrupt was discharged from his debts pursuant to the acts of Congress relating to bankruptcy, he may apply upon proof of his discharge to the court in which the judgment was rendered against him for an order directing the judgment to be cancelled and discharged of record, and if it appears upon the hearing of such application that he has been discharged from the payment of that judgment or the debt upon which it was recovered, an order must be made directing that it be cancelled and discharged of record. Whereas by the law of the land the said court ought to have decided that the said discharge in bankruptcy released the plaintiff in error from the said judgment and ought to have directed that the said judgment be cancelled and discharged of record in the office of the clerk of the said court in the county of New York where the same was entered and docketed.

II. That the said court erred in deciding and adjudging that the plaintiff in error was not released and discharged from the said judgment in question recovered against him by the said defendant in error by the said discharge in bankruptcy in question granted to him on the 2nd day of February, 1900, in the said district court of

the United States for the southern district of New York, whereas by the law of the land the said court ought to have decided that the said discharge in bankruptcy released and discharged the plaintiff in error from the said judgment.

45 III. That the said court erred in deciding that the action in question in which the said judgment was recovered against the plaintiff in error was an action for willful and malicious injury to the person of the defendant in error, whereas by the law of the land the said court ought to have decided that the said action in which the said judgment was recovered was not an action for willful and malicious injury to the person of the defendant in error.

IV. That the said court erred in deciding that the action in question in which the said judgment was recovered against the plaintiff in error was an action for willful and malicious injury to the property of the defendant in error, whereas by the law of the land the said court ought to have decided that the said action in which the said judgment was recovered was not an action for wilful*l* and malicious injury to the property of the defendant in error.

V. That the said court erred in deciding that the said judgment in question recovered against the plaintiff in error came within the exceptions of section 17 A of the bankrupt act, and that therefore the plaintiff in error was not released by his said discharge in bankruptcy from the said judgment, whereas by the law of the land the said court ought to have decided that said judgment did not fall or come within any of the exceptions of said section 17 A of the bankrupt act, and that the plaintiff in error was released therefrom by his said discharge in bankruptcy.

46 VI. That by the record aforesaid of the said supreme court of the State of New York, it appears that the order aforesaid was given for the defendant in error against the plaintiff in error, whereas by the law of the land the said order ought to have been given for the said plaintiff in error against the said defendant in error, and therefore was erroneously given.

Wherefore the said Charles A. Tinker, plaintiff in error, prays that the order of the said supreme court of the State of New York made at special term, the order of the appellate division of the supreme court of said State affirming said order at special term, and the order of the court of appeals of the said State affirming the order of the appellate division, and the order entered in said supreme court of said State on the remittitur of the court of appeals may all be reversed with costs in each court, and that the said supreme court of the State of New York may be ordered and directed to enter an order that the said judgment recovered against the plaintiff in error be cancelled of record in the clerk's office of said court in the county of New York with the costs of this court.

CHARLES A. TINKER,
Plaintiff in Error,
By NELSON SMITH,
Att'y for Pl'ff in Error, 141 *Broadway, New York City.*

47 [Endorsed:] In the Supreme Court of the United States, October term, 1902. Charles A. Tinker, pl't'ff in error, against Frederick L. Colwell, def't in error. Assignments of error. Nelson Smith, att'y for pl't'ff in error, 141 Broadway, New York city. Due service of the within assignments of error is hereby admitted N. Y. Nov'r 11th, 1902. Thos. McAdam, att'y for def't in error.

48 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the State of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea, which is in the said supreme court of the State of New York, before you or some of you, entered on the remittitur from the court of appeals of said State, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Frederick L. Colwell and Charles A. Tinker, wherein was drawn in question the validity of the discharge in bankruptcy granted to said Charles A. Tinker by the district court of the United States for the southern district of New York in the second circuit, under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved July 1st, 1898," and the decision was against the validity of said discharge, manifest error hath happened to the great damage of the said Charles A. Tinker, as by his complaint appears, we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be therein given, that then, under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done

49 therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, the 23d day of October in the year of our Lord one thousand nine hundred and two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

50 [Endorsed:] In the Supreme Court of the United States, —— term, 1902 Charles A. Tinker, plaintiff in error, against Frederick L. Colwell, defendant in error Writ of error. Nelson Smith, att'y for p'l't'ff in error, 141 Broadway, city and county of New York. Received in county clerk's office New York this 19th day of November 1902 Thos. L. Hamilton clerk

51 UNITED STATES OF AMERICA, *ss:*

To Frederick L. Colwell, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of New York in the city and county of New York, wherein Charles A. Tinker is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States this 23 day of October, in the year of our Lord one thousand nine hundred and two.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

52 [Endorsed:] In the Supreme Court of the United States. Charles A. Tinker, plaintiff in error, against Frederick L. Colwell, defendant in error. Citation. Nelson Smith, att'y for pl't'ff in error, 141 Broadway, New York city. Served Nov. 3 1902 by F. A. C.

UNITED STATES OF AMERICA,
State of New York, Southern District of New York, } *ss:*

Frank A. Cox being duly sworn deposes and says; that he is upwards of twenty-one years of age; that on the 3rd day of November, 1902, at the city of New York he served the annexed citation on Frederick L. Colwell, to whom the same is directed, by delivering to and leaving with him personally a true copy of the said citation at his office No. 45 Broadway, in the said city and county of New York, and at the same time showing him the judge's signature to the original; that he knew the person served to be the same person mentioned and described in the said citation as the defendant in error therein, and further deponent says not.

FRANK A. COX.

Subscribed and sworn to before me this 7th day of November, 1902.

{Seal of John A. Shields, United States Commissioner, Southern District of N. Y.}

JOHN A. SHIELDS,
U. S. Com., S. D. of N. Y.

53 Supreme Court of the United States, October Term, 1902.

CHARLES A. TINKER, Plaintiff in Error,
against
FREDERICK L. COLWELL, Defendant in Error.

Please enter my appearance as attorney and counsel for the defendant in error, and I hereby waive the issuance of citation and all security for costs or otherwise on this writ.

Dated October — 1902.

THOS. McADAM,
Attorney for Defendant in Error,
220 Broadway, New York City.

To James H. McKenney, clerk.

54 [Endorsed:] In the Supreme Court of the United States. Charles A. Tinker, plaintiff in error, against Frederick L. Colwell, defendant in error, Notice of appearance, waiver of bond and issuance of citation. Thomas McAdam, att'y for def't in error, 220 Broadway, New York city.

Endorsed on cover: File No. 18,738. New York supreme court. Term No. 160. Charles A. Tinker, plaintiff in error, *vs.* Frederick L. Colwell. Filed November 21st, 1902.